Filed 6/28/19 In re J.G. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J.G., a Person Coming Under the Juvenile Court Law.	
S.M., Petitioner and Appellant, v. M.G., Objector and Respondent.	F078020 (Super. Ct. No. S-1501-PT-33993) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John L. Fielder, Judge.

S.M., in pro. per., for Petitioner and Appellant.

M.G., in pro. per., for Objector and Respondent.

-ooOoo-

INTRODUCTION

Appellant S.M. appeals the trial court's judgment declaring his then four-year-old daughter, J.G., free from the custody and control of appellant and terminating appellant's parental rights as to J.G. on the basis that appellant abandoned J.G. He contends the judgment must be reversed because the court did not make the requisite findings of abandonment under Family Code section 7822.[1] We vacate the court's alternate finding of abandonment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and respondent mother, M.G., were in a relationship for three years. After the relationship ended, respondent gave birth to J.G. On July 15, 2014, appellant filed a petition to establish parental relationship with regard to J.G. On August 29, 2014, the parties reached an agreement on a visitation schedule for appellant and J.G. On June 1, 2015, the court ordered appellant to pay child support in the amount of $1,545 per month, as stated in a "Findings and Orders After Hearing," filed on October 1, 2015. Appellant appears to have objected to the amount awarded, and instead paid $1,400 a month.

On November 17, 2015, the court advised appellant and respondent of their rights regarding establishment of parental relationship, and both parties waived said rights. The court granted judgment of paternity as to appellant and declared him father of J.G.

On June 1, 2017, appellant filed an "Affidavit of Facts" wherein he declared:

> "1. I [appellant] [have] never entered into any such contract regarding support with [respondent].
>
> "2. [Respondent] has failed to produce said contract.
>
> "3. [Respondent] is not entitled to support. Wehunt v[.] Ledbetter[.]

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[1] All further undesignated statutory references are to the Family Code.

"4. I am not the legal father of [J.G.], nor am I an obligor to any third-party contracts regarding support.

"5. [Appellant] and [respondent] were never married.

"6. I have not signed, nor will I ever sign a *Voluntary* Acknowledgement of Paternity.

"7. [Appellant] is not listed [as] the father on the birth certificate.

"8. I have not held open in court that I am the legal father.

"9. I have not submitted to any paternity tests, nor will I willingly or willfully comply with any requests to do such."

The affidavit was accompanied by a "Motion to Dismiss Order for Support/ Demand Refund," in which appellant requested to be relieved of his child support obligations and requested a refund of all child support payments he had made for the past two years with interest. Appellant attached an amortization schedule he had created for the child support payments he had made to J.G., indicating a "loan amount" of $34,535.87 (the "accumulated value" of the amount he had paid in child support). The schedule showed he expected J.G. to make 180 monthly payments of $371.12 to him, for the "total cost of loan" being $66,802.35.

A hearing originally calendared for visitation and other issues was held on June 5, 2017. However, the minute order reflected that appellant's "right to being the legal father of the minor child and to terminate his rights [was] argued." The order of the court was that the paternity findings made on November 17, 2015, are void and set aside. The minute order then stated:

> "In the alternative the court grants an abandonment. [¶] Parties waive notice of an abandonment hearing. [¶] . . . [¶] The court makes the following findings and orders: [¶] [J.G.] is declared free from the parental care, custody and control of [appellant] and his parental rights and responsibilities are forever terminated. [¶] [Appellant] is not obligated to pay future child support. Parties waive the right to reimbursement and agree [r]espondent shall not have to refund any monies to date."

On December 12, 2017, appellant filed a request to set aside the June 5, 2017, order terminating his parental rights. On January 16, 2018, the court denied appellant's request.

The court then held a hearing on its own motion "re judgment of freedom from parental custody and control" and the waiver of child support on March 2, 2018. At the hearing, the court requested briefing from the parties on whether or not to grant the request to set aside orders made on June 5, 2017, regarding dismissal of the paternity action and termination of parental rights. The parties briefed the issues, and the court deemed the matter under submission as of April 27, 2018.

On July 3, 2018, the court issued a written ruling denying appellant's request to set aside the termination of his parental rights made on June 5, 2017, and explaining its June 5, 2017 decision. The ruling read:

> "This matter came before the Court regarding [appellant's] motion to set aside the orders of June 5, 2017. The Court ordered the parties to submit written briefs concerning their respective positions as to the dismissal of the paternity action and termination of parental rights orders made June 5, 2017. . . .
>
> "Based upon the arguments and responsive arguments presented by both parties, this court rules as follows:
>
> "The Court denies [appellant's] request on several grounds.
>
> "This matter came before the court on June 5, 2017 regarding [appellant's] failure to again pay child support. During the court proceedings [appellant] indicated he is not [J.G.'s] father and did not feel he should be required to pay child support for a child he is not the biological parent of. [Appellant] then asked the court to set aside the paternity findings of November 17, 2015 and to make a finding he is not [J.G.'s] father. [Appellant] also requested child support orders be set aside and the court drop any support arrears and contempt proceedings. [Appellant] further requested the court terminate any parental rights and obligations he might have towards [J.G.] [Appellant] continued in this vain for a period of time. The Court admonished [appellant] such a motion was not on calendar for determination by the court. [Appellant] persisted and offered to waive any

notices for said request and any formal motions related to the request. The Court admonished [appellant] that the effect of such a finding would be tantamount to terminating his parental rights as well as any child support obligations. [Appellant] advised the Court he understood his parental rights would be terminated, but did not care, as the child was not his and he had no desire to be a father to [J.G.] [Respondent] advised the Court through counsel they were also willing to waive any notices of the motion and to join in the motion and would agree to waive any rights to child support on behalf of [J.G.] The Court told the parties to discuss the matter during a recess and the Court advised [appellant] [the Court] would delay the hearing so [appellant] could think further about his request if he so desired.

"After a substantial delay, the Court resumed the proceedings. [Appellant] advised the court he still would like to have the court set aside the paternity finding and to terminate any paternity rights and obligations he might have as to the child. The Court again advised him of the finality of such findings as to [J.G.] [Appellant] literally begged the Court to grant his request and agreed to waive any statutory notices and any formally filed motions. [Respondent] also agreed to waive any notices and any filings.

"The Court then asked each of the parties if they would agree to a finding of non-paternity as to [appellant]. The parties both agreed. The Court asked if the parties would agree to the dismissal of the paternity action and dismissal of the arrears. The parties both agreed. [Appellant] asked [respondent] [to] repay him the monies [respondent] had previously received for [J.G.] [Respondent] declined. [Appellant] thereafter agreed [respondent] did not have to repay him for those monies already received.

"The Court advised [appellant] of his Constitutional rights and he waived any said rights. The Court then entered the judgment as agreed by the parties and set aside the previous paternity finding.

"[Appellant] had a right to file a motion to request the agreed upon order be set aside for a period of not more than six months. He did not file such a motion until far in excess of the six month maximum. It appears to the Court this motion is a disingenuous attempt by [appellant] to avoid paying child support and may have been such from the beginning. The Court has seldom seen such conduct from a party and is disturbed by the conduct of [appellant]. The Court assumes parties are acting in good faith when requesting resolution of their matters by compromise. In this case the Court notes the compromise was put forth by [appellant] himself and the Court was only willing to consider[] it because [appellant] was so intent on having no relationship with [J.G.] If this was merely [appellant's] effort to avoid paying child support, then he has out foxed himself.

"The Court will not undo the order both parties agreed to. Motion denied."

On July 5, 2018, judgments and notices of entry of judgment were filed for the November 17, 2015 and June 5, 2017 orders. The written judgment for the proceedings of June 5, 2017, contained the following findings and orders of the court:

> "1. The court orders that the Paternity findings made on November 17, 2015 are void and set aside. In the alternative, the court grants an abandonment.
>
> "2. [J.G.] is declared free from the parental care, custody and control of [appellant].
>
> "3. [Appellant]'s parental rights and responsibilities as to [J.G.] are forever terminated.
>
> "4. [Appellant] is not obligated to pay future child support. The parties waive the right to reimbursement and agree [r]espondent shall not have to refund any monies paid to date.
>
> "5. The request for attorney fees is denied."

Appellant filed an appeal to the judgment terminating his parental rights on the ground of abandonment.

On September 12, 2018, in this court, appellant filed a motion to strike an amended order filed by the superior court on August 29, 2018, on the ground it was filed after appellant's notice of appeal and thus could not be considered. On October 2, 2018, this court deferred ruling on the motion pending consideration of this appeal on its merits. The amended order adds one sentence to the trial court's written ruling for the hearing on March 2, 2018: "The Petitioner also made a motion to strike the Respondent's brief in its entirety." The amended order has no bearing on our disposition of this case. Appellant's motion is denied as moot.

DISCUSSION

Among many other contentions, most of which are meritless, appellant contends the June 5, 2017 order terminating his parental rights must be reversed because the trial

court did not make a finding that the requirements for abandonment had been met. We agree that there was no factual basis for a stipulation for an abandonment finding and therefore vacate that finding. However, as the order of abandonment was an alternate finding, it has little effect on the remainder of the court's judgment, as we will explain.

We start by noting the California Rules of Court provide an appellant with a choice of several types of records upon which to take an appeal. The choices include a reporter's transcript, a clerk's transcript, appendices, original superior court file, an agreed statement and a settled statement. (Cal. Rules of Court, rules 8.120 & 8.121.) Appellant has elected to proceed with only a clerk's transcript. Our review is limited to determining whether any error "appears on the face of the record." (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521; see Cal. Rules of Court, rule 8.163.) On appeal, we must presume the trial court's judgment is correct. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) In service of that rule, we adopt all intendments and inferences to affirm the judgment or order unless the record expressly contradicts them. (See *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583.)

Even on the face of this sparse record, with our making all inferences in favor of the judgment, it is clear the trial court committed error in making an abandonment finding. Section 7800 et seq. governs proceedings to have a minor child declared free from a parent's custody and control. (§ 7802; *Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1009 (*Allison C.*).) "A declaration of freedom from parental custody and control . . . terminates all parental rights and responsibilities with regard to the child." (§ 7803.) A court may declare a child free from parental custody and control if the parent has abandoned the child. (§ 7822; *Allison C., supra*, at p. 1010.) An abandonment proceeding may be brought where " 'three main elements' are met: '(1) the child must have been left with another; (2) without provision for support or without communication from . . . his [or her] parent[] for a period of one year; and (3) all of such acts are subject to the qualification that they must have been done "with the intent on the part of such

parent . . . to abandon [the child]." ' " (*Allison C.*, *supra*, at p. 1010; see § 7822, subd. (a).)

Though we presume the correctness of the court's findings, the record directly contradicts that appellant left J.G. without provision for support or communication for a period of one year. The evidence was uncontroverted that appellant had been actively participating in the paternity action, paid child support regularly (albeit not the full amount ordered), and visited with J.G. There is no evidence supporting the abandonment finding.

Our discussion does not end here. Though termination of parental rights normally flows from a finding of abandonment, here, the abandonment finding was an *alternate* finding. The court's orders setting aside the paternity finding of November 17, 2015, and dismissing the parentage action in effect "terminated" the parent and child relationship established between appellant and J.G. without respect to the abandonment finding. The November 17, 2015 paternity finding established the parent and child relationship between appellant and J.G. (See § 7630.) The parent and child relationship is legally defined as "the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." (§ 7601, subd. (b).) Thus, the orders dismissing the parentage action and setting aside the paternity finding removed not only his obligation to pay child support but any and all other rights and privileges incident to the parent and child relationship including his legal rights to custody and visitation. (See § 7601.) As appellant's "parental rights" stemmed from the paternity finding and that finding was set aside, appellant had no parental rights to be terminated by the abandonment finding.

Appellant is rigidly specific in that he only appeals the abandonment finding and the termination which stemmed from that finding, and not the setting aside of the paternity finding. This appears to be a deliberate, intentional and strategic action, albeit incongruent on his part. In appellant's opening brief, he writes:

> "The [court's written ruling] reads that [the court] believes that [appellant's motion] was an 'attempt by [appellant] to avoid paying child support and may have been such from the beginning.' *Agreed. Child Support meaning legal obligations arising from a paternity finding.* [Citation.] *This is not disputed. What is disputed is a finding of abandonment and an order terminating my parental rights.*" (Italics added.)

Appellant appears to believe his request will allow him to pursue custody and visitation of J.G. but protect him from child support obligations. Appellant confirmed this at oral argument, where he was adamant he did not want a paternity finding in place. This is consistent with the affidavit appellant filed in the trial court, wherein appellant declared under penalty of perjury he is not the legal father of J.G. and has not and will not ever sign a voluntary declaration of paternity. As the abandonment finding is the only issue before us on appeal, we will not address the trial court's other orders made on June 5, 2017.

Our vacating the abandonment finding has no effect on the state of appellant's legal relationship with J.G., which is now nonexistent. If appellant's narrow appeal was an effort to regain standing to establish custody and visitation with J.G. without having to pay child support, then he has again, to quote the trial court, "out foxed himself."

DISPOSITION

We vacate the trial court's finding of abandonment only. Our disposition has no bearing on the trial court's orders that the paternity findings made on November 17, 2015, are void and set aside, the paternity action is dismissed, or any other orders made on June 5, 2017. If appellant attempts to file any documents with regard to the custody or visitation of J.G., he must not be permitted to do so as the action has been dismissed, and the judgment dismissing it is now final. The trial court shall not consider any issues regarding appellant's custody or visitation rights to J.G. unless a parentage action is initiated by any party. In making any future parentage decisions, the trial court is advised to take note of the final judgment setting aside the previous paternity finding as void and appellant's declaration under penalty of perjury that he is not the legal father of J.G., will

never sign a voluntary declaration of paternity, and will not willingly or willfully comply with any requests to take a "paternity test."[2]

_____
DE SANTOS, J.

WE CONCUR:

_____
POOCHIGIAN, Acting P.J.

_____
PEÑA, J.

[2] This opinion does not address any actions related to this matter brought by respondent, J.G., or any government agency.